

**115 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No. 1562 of 2016(O&M)

Date of decision: 07.04.2016

Hardev Singh

...Appellant(s)

Versus

Jit Singh and another

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE JITENDRA CHAUHAN

Present: Mr. Ranjit Saini, Advocate,
for the appellant(s).

JITENDRA CHAUHAN, J.

CM-4317-C-2016

Learned counsel for the appellant contends that deficiency of Court fee has already been made good. Delay, if any, in making up the deficiency of Court fee is condoned. CM stands disposed of.

CM- 4319-C-2016

This is an application for condonation of delay of 233 days in re-filing the appeal. It is averred that the appeal was filed on 04.04.2015 within the limitation period, however, the same was returned with objections on 07.05.2015. The appellant after removing the objections re-filed the appeal within time on 11.12.2015 but

again the same has been returned with objections dated 06.02.2016.

The appeal was again filed on 11.02.2016.

Keeping in view the averments made in the application and the accompanying affidavit, and the fact that the objections were minor in nature, there appears to be sufficient cause for allowing the same. The delay of 233 days in refiling the present appeal is hereby condoned subject to all just exceptions.

CM No. 4318-C-2016

For the reasons contained in the application which is duly supported by an affidavit, the delay of 7 days in filing the appeal is condoned and the application is allowed.

Main case

This appeal has been filed by defendant No. 1 against the judgment and decree dated 12.12.2014, passed by Additional District Judge, Ludhiana vide which the appeal filed by the plaintiff was partly allowed and the suit of the plaintiff was partly decreed for grant of alternate relief of refund of earnest money along with interest.

In brief, respondent No. 1/plaintiff, Jit Singh filed suit for possession by way of specific performance of agreement to sell dated 27.12.2005 and in the alternative suit for recovery of Rs. 3,76,000/-. It was pleaded by the plaintiff that an agreement to sell dated 27.12.2005 was entered into between the plaintiff and the

defendant regarding land measuring 8 Kanal out of the land fully detailed in the head note of the plaint situated at Village Kubba, Tehsil Samrala, District Ludhiana. The rate of the land was fixed at Rs. 3 lacs per killa out of which Rs. 1,88,000/- were received by the defendants as earnest money. The sale deed was to be executed up to 30.12.2006. The plaintiff always remained ready and willing to perform his part of the contract but the defendant did not turn up for execution and registration of the sale deed. In this regard, the plaintiff had sworn an affidavit in the office of Sub Registrar. The defendant did not come forward to honour the agreement to sell dated 27.12.2005, hence the suit.

Upon notice, the defendants appeared and filed written statement contesting the suit of the plaintiff. The execution of agreement to sell dated 27.12.2005 was denied by the defendants. The plea taken by the defendants was that they had borrowed a sum of Rs. 1,40,000/- from the plaintiff which was to be returned with interest @ 3.5% per month. The defendants tried to trace out the plaintiff but they could not find him, thus the payment could not be made.

After appraisal of the evidence, the learned trial Court dismissed the suit of the plaintiff in toto holding that the plaintiff has failed to prove readiness and willingness to perform his part of

the contract.

Feeling aggrieved, the plaintiff filed an appeal before Additional District Judge, Ludhiana against the judgment and decree dated 06.02.2013 passed by the trial Court. The First Appellate Court partly allowed the appeal and the suit of the plaintiff was partly decreed. The plaintiff was held entitled to the alternative relief of recovery of Rs. 1,88,000/- along with interest @ 9% per annum.

Feeling dissatisfied, the defendant No. 1 has preferred the present regular second appeal challenging the judgment and decree passed by the First Appellate Court.

It is contended on behalf of the appellant that the lower Appellate Court has erred in partly decreeing the suit of the plaintiff. The plaintiff has failed to prove readiness and willingness to perform his part of the contract. In such circumstances, when the plaintiff has not discharged his onus, he was not entitled to any relief arising out of the agreement to sell dated 27.12.2005. It is further contended that the case of the defendant/appellant is that no such agreement to sell was ever executed by the defendants. It was a money transaction. The same was subsequently converted into the agreement to sell.

The learned counsel for the appellant further contends

that in the face of the fact that the plaintiff has failed to prove his readiness and willingness to honour the alleged agreement to sell, the alternative relief of recovery of the earnest money ought not to have been ordered by the First Appellate Court.

The main thrust of the learned Counsel for the appellant is that in order to seek a discretionary relief firstly, the plaintiff was required to prove the readiness and willingness to perform his part of the contract and the agreement itself. The relief of refund of earnest money is ordered when the Court finds that the specific performance of the agreement will cause hardship to the other party. In other words, the execution of the agreement as well as the readiness and willingness are the condition precedent.

I have heard the learned counsel for the appellants and gone through the case file.

The balance of discretionary relief of specific performance has already been tilted against the plaintiff by both the Courts below. The grouse of the defendant/appellant is that the refund of the amount ought not to have been ordered. This Court does not find itself in agreement with the contentions raised by the learned counsel for the appellant inasmuch as the defendant himself has admitted before the trial Court that he received a sum of Rs. 1,40,000/-from the plaintiff. The plaintiff has also led

evidence to prove that the amount of Rs. 1,40,000/- was received by the defendant. The said amount has not been returned by the defendant to the plaintiff as yet. It is nowhere the case of the defendant that he has returned the said amount to the plaintiff. The argument of readiness and willingness advanced by the learned counsel for the appellant is inconsequential in view of the fact that the stand of the defendant before the Courts below is that he borrowed a sum of Rs. 1,44,000/- from the plaintiff as a loan. The first Appellate Court by accepting the plea of the defendant that the alleged agreement to sell was a means of securing repayment of loan, ordered the refund of the amount. Since the nature of the agreement has been held to be a security for loan transaction, the question of proving readiness and willingness does not survive any more. The factum of amount of Rs. 1,40,000/- having been taken by the defendant from the plaintiff has been admitted by the defendant before the Courts below. In the case of **Alex Joseph Vs. Madhavan Nair (2005) 12 SCC 378**, Hon'ble the Supreme Court had sent the matter back to the High Court with the following observation :-

“If the High Court finds that the transaction was not one of agreement to sell but of loan and security of repayment, then a decree for refund of such amount as

was advanced by the plaintiff to the defendant and had remained unpaid may be passed with such interest as to which the plaintiff may be found entitled.”

This being so, the first Appellate Court has rightly directed the defendant to refund the amount of Rs. 1,88,000/- along with interest to the plaintiff. This Court does not find any illegality or irregularity in the judgment passed by the lower Appellate Court. There is no question of law much less substantial question of law involved in the present regular second appeal.

Consequently, the same is dismissed.

07.04.2016
SN

(JITENDRA CHAUHAN)
JUDGE